

# **2020 ADVANCED DUI TRIAL ADVOCACY**

August 31 – September 3, 2020  
Phoenix, Arizona



**Thursday, September 3, 2020**

## **Right to Counsel**

Presented by:

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
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RIGHT TO COUNSEL

By: Tobin Sidles

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RIGHT TO COUNSEL – MOTIONS PRACTICE

- Generic defense DUI motion arrives – The State interfered with my clients right to counsel!
- First step - Start with determining what provision(s) apply, and which ones they are really arguing?

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RIGHT TO COUNSEL

- Look at their motion. Is it a Federal, State, Statutory claim or other?

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### RIGHT TO COUNSEL - MOTIONS

- Federal- United States Constitution
  - Fifth Amendment –No person...shall be deprived of life, liberty, or property, without due process of law.
  - Sixth Amendment –In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

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### RIGHT TO COUNSEL - MOTIONS

- 2) State - The Arizona Constitution
  - Article 2, Section 4- No person shall be deprived of life, liberty or property without due process of law.
  - Article 2, Section 24 –In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel...

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### RIGHT TO COUNSEL - MOTIONS

- Important motions tip- The Right to Counsel under Arizona Law is no broader than under the US Constitution.
- See *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (App. 1996)

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## RIGHT TO COUNSEL - MOTIONS

- Statutory -ARIZONA REVISED STATUTES (A.R.S.)
  - A.R.S. 13-114
    - In a criminal action defendant is entitled:
      2. To have Counsel.

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## RIGHT TO COUNSEL - MOTIONS

- Rules of Court
  - Rules of Criminal Procedure, Rule 6.1 (a)
 

A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty.

The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after the defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefore.

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## RIGHT TO COUNSEL – DUI’S

### AZ Caselaw

*State v. Juarez*, 161 Ariz. 76 (1989)–Right to attorney before choosing chemical test

*McNutt v. Superior Court*, 133 Ariz. 7 (1982) –State cannot prevent access to attorney if requested.

*State v. Clary*, 169 Ariz. 10, 2000 (memorandum warning!!) – Right to a private consultation (but see *Municipal Court v. Waldron*, 157 Ariz. 90 (1988)- must request privacy)

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## RIGHT TO COUNSEL



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## RIGHT TO COUNSEL -MOTIONS

- Why so many listed?? Generally, the Courts have held the right to assistance of counsel is essential because it is the means by which defendants assert all their other constitutional rights.
- Generally, *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S.Ct. 2574 (1986); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), etc.

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## RIGHT TO COUNSEL-MOTIONS

- NEXT STEP BEFORE WRITING YOUR RESPONSE?
- Determining whether the defendant's right to counsel has actually attached .

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### MOTIONS-WHEN DOES 5<sup>TH</sup> AMENDMENT RIGHT TO COUNSEL ATTACH?

- A. Fifth Amendment/*Miranda* does not attach until both are met
    - Defendant must be:
      - 1) IN CUSTODY
      - AND
      - 2) SUBJECT TO INTERROGATION
- See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966)

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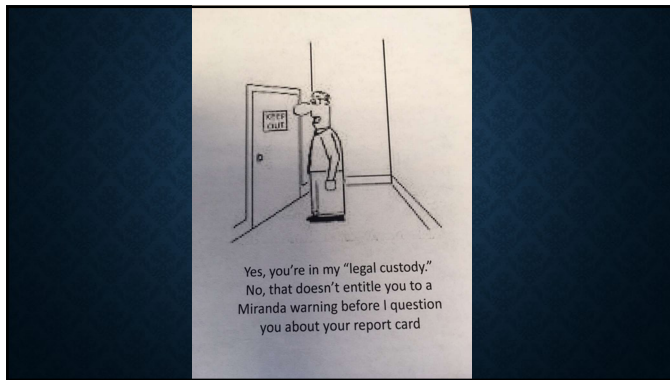
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### MOTIONS -SIXTH AMENDMENT RIGHT TO COUNSEL?

- B) Sixth Amendment
  - Not attached until the commencement of criminal proceedings, often such as arraignment. (a critical stage.)
    - *US v. Goveia*, 467 U.S. 180, 81 L. Ed. 2d 146 (1984)
    - *Davis v. U.S.* 512 U.S. 452, 456-57 (1994)
    - *Chavez v. Martinez* 538 U.S. 760, 123 S.Ct. 1994 (2003)

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## WHEN DOES RIGHT TO COUNSEL ATTACH?

- AZ Rule- Rule 6.1 Rules of Criminal Procedure
- In any criminal proceeding including after a defendant has been taken into custody (so after arrest or Grand Jury Proceedings).

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## RIGHT TO COUNSEL - MOTIONS

- Most Common Sixth Amendment Issues seen in DUI cases:
  - Is the Defendant entitled to a court appointed attorney?
  - Conflicts between the defense counsel and the defendant
  - Waiver of counsel issues
  - Ineffective assistance of counsel

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## 6TH AMENDMENT



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## RIGHT TO COUNSEL - MOTIONS

### • NEXT :

- 5<sup>th</sup> Amendment -Determine if the defendant "**clearly and unambiguously**" invoked their right to counsel.
- If so, for what purpose?

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## RIGHT TO COUNSEL -MOTIONS

- FEDERAL - The right to counsel must be clearly invoked.
- [W]hether [the defendant] actually invoked his right to counsel...is an objective inquiry. (citation omitted) There must, at a minimum, be statement from the suspect that can 'reasonably be construed' to be an expression of a desire for the assistance of an attorney (citation omitted) Where a suspect makes reference to an attorney that is ambiguous or equivocal, the officers may continue with their questioning... *Sechrist v. Ignacio*, 549 F.3d 789, 807-808 (9<sup>th</sup> Cir. 2008)

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## RIGHT TO COUNSEL - MOTIONS

- **ARIZONA -Request Must Be Unambiguous**
- *State v. Thornton*, 172 Ariz. 449, 837 P.2d 1184 (App. 1992) ("talk to my lawyer," in response to the officers questions was not an invocation.)
- *State v. Mada*, 168 Ariz. 289, 812 P.2d 1107 (App. 1991) ("I want to answer your questions, but my attorney told me not to talk to you guys," was not an invocation.)

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### RIGHT TO COUNSEL MOTIONS

- *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994) (“I think I’d better talk to a lawyer first” was not a clear request for counsel.
- *State v. Linden*, 136 Ariz. 129, 664 P.2d 673 (App. 1983). (Defendants inquiry- who he should get for an attorney?, was not an invocation. The officer testified he took the question for advice on who a good attorney would be.)

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### RIGHT TO COUNSEL - MOTIONS

- *State v. Nevarez*, 2014 WL 2566061 (App. 2014). Statement that suspect wanted an attorney to “read (him) the warrant” was not a clear invocation.
- *State v. Keyonnie*, 181 Ariz. 485 (1995) “Lawyer Present today, right now.” ??

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### RIGHT TO COUNSEL

- *Keyonnie*- found this WAS a violation. However, the remedy was suppression of the blood test, not a dismissal.

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## RIGHT TO COUNSEL - MOTIONS

• NEXT:

• WHO MAY MAKE THE REQUEST?

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## MOTIONS - THE RIGHT TO COUNSEL IS PERSONAL

- The right to counsel is personal and can only be claimed by the defendant or his lawyer (unless the defendant is a minor.)
- *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (App. 1006);  
*Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed. 2d 410 (1986)

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## MOTIONS - RIGHT TO COUNSEL

- The privilege is personal to the client and can (also) only be waived by him/her.
- *State v. Griswold*, 105 Ariz. 1, 457 P.2d 331 (1969)

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**MOTIONS - RIGHT TO COUNSEL****CHECK THE INVOCATION!**

- A defendant may invoke for a limited purpose!
- State v. Urain ,157 Ariz. 21, 754 P.2d 350 (1988)

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**RIGHT TO COUNSEL -INVOKED**

- **Never assume the invocation is for everything at the motions!** Look at:
  - When did suspect invoke?
  - What was it in response to?
    - Admin per se?/*Miranda*?
  - What did the suspect say?
  - What did the officer do?
    - Allow a phone call?, not ask questions?, etc.

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**MOTIONS- RIGHT TO COUNSEL - WAIVER**

- Once the right is invoked, the waiver must be voluntary, knowing and intelligent.
  - *Edwards v. Arizona*, 451 U.S. at 481, 1010 S.Ct. at 1884
  - Fact specific question- includes background, experience and conduct of the accused.

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### MOTIONS-RIGHT TO COUNSEL - WAIVER

- Absence of a written waiver does not constitute reversible error.
- *State v. Harding*- 137 Ariz. 278, 670 P.2d 383 (1983)

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### THE FIFTH AMENDMENT



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### RIGHT TO COUNSEL -MIRANDA

- Fifth Amendment
  - Suspect must be affirmatively advised of the right to counsel, and other constitutional rights, prior to being subjected to "custodial interrogation."
- *Berkemer v. McCarty*, 468 U.S. 420 (1984)

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## MIRANDA

- “You have the right to remain silent. Anything you say can and will be used against you in a court of law...”



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## ARGUING MOTIONS -WHAT CONSTITUTES CUSTODY?

- Restraint of freedom of movement “of a degree associated with a formal arrest”.
- Mere fact the investigation is focused on the suspect does not trigger need for Miranda.
  - *Minnesota v. Murphy*, 465 U.S. 420 (1984)

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### ARGUING MOTIONS- RIGHT TO COUNSEL

- BEST PRACTICES - ARGUE THAT "MERE CONTACT DOES NOT EQUAL CUSTODY"
- Whether the defendant was free to leave or not is not dispositive! That is just one part! Was there a situation analogous to a formal arrest? Did the officer tell him so (what language was used) or actually prevent him from leaving? How?

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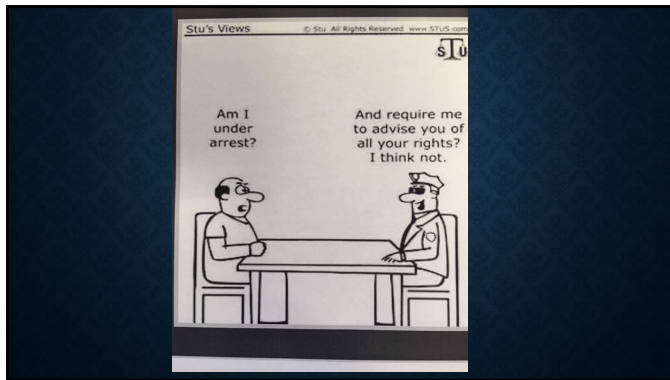
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### WHAT CONSTITUTES CUSTODY?

- Courts will look at:
    - Site of the interrogation (Police station, roadside, etc.)
    - Whether objective indicia of arrest are present (in handcuffs, gun drawn, number of officers, etc.)
    - Form and length of the interrogation
      - (Subjective intent is removed)
- California v. Beheler*, 103 S. Ct. 3517 (1983); *State v. Cruz-Mata*, 138 Ariz. 370 (1983)

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**MOTION ARGUMENT- RIGHT TO COUNSEL**

- Remember-Fifth Amendment needs Custody AND Interrogation.
- Best Practice in your DUI motions- Questioning at the *roadside* after a routine traffic stop is clearly not "custodial interrogation".
- Berkemer v. McCarty, 468 U.S. 420 (1984)

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**MOTION ARGUMENT**

- And...
  - They were not in handcuffs,
  - There was only one other officer who was focused on controlling traffic at the scene with cars going by...
  - The officer did not draw his/her gun (or taser, etc.)...
  - The investigation only took thirty minutes ...
  - and so on...

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**MOTIONS ARGUMENT - RIGHT TO COUNSEL**

- Another Best Practice- Your motion should say: Officer may ask a "moderate number of questions" to determine identity and to try and confirm or dispel the officer's suspicions and:
- Berkemer v. McCarty, 104 S. Ct. 3138, 3150 (1984)

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### MOTIONS ARGUMENT- RIGHT TO COUNSEL

- To Counter another Common Defense Ploy: "But there was more than the one question!" - There is no "one free question" rule! A moderate number of questions are allowed to confirm or dispel suspicion is the actual law. See *Berkemer, Id.*

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### MOTIONS ARGUMENT- RIGHT TO COUNSEL

- Need a lawyer for Field Sobriety Tests? No, they are physical evidence, not testimonial. If not testimonial- no need for an attorney!
- *State v. Theriault*, 144 Ariz. 166, 696 P.2d 718 (App.1984)
- *California v. Byers*, 402 U.S. 424, 431-32 (1971)

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### MOTIONS ARGUMENT - RIGHT TO COUNSEL

#### FST's

- Miranda does not need to be read merely because the officer is administering FST's. This is true even if the suspect is already under arrest. (Why? Again, these are physical tests.)
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (App. 1995)

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**MOTIONS ARGUMENT- RIGHT TO COUNSEL**

- Our latest challenges – DRE Protocols!!
- Note the majority of the DRE protocol is NOT testimonial but mere physical evidence obtained from observations.
  - -So DRE not subject to *Miranda* warnings!
- Even if the suspect invokes his right to counsel- the officer may proceed with the physical examination!
  - Best Practice tip- Recalcitrant defendant- The officer should skip the formal questions and just get on with their observations.

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**MOTIONS ARGUMENT-FIELD SOBRIETY TESTS (AND DRE PROTOCOLS)**

- Officers may comment on refusals to take them at trial!
- Fifth amendment does not apply as they are physical (non-custodial) tests.
- Fourth Amendment does not prevent an officers comments on observations.
  - Trial tip- Both Motion in limine and ask for a jury instruction!
  - *State v. Theriault*, 144 Ariz. 166 (App. 1984); *State v. Superior Court (Spears)*, 154 Ariz. 275 (App. 1987)

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**MOTIONS ARGUMENT- RIGHT TO COUNSEL**

- Fifth Amendment
  - Spontaneous outbursts are admissible.
    - *State v. Landrum*, 112 Ariz. 555 (1976); *Fisher v. U.S.*, 425 U.S. 391, 400, 96 S. Ct. 1569 (1976)
  - "I couldn't do that if I were sober."

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MOTIONS ARGUMENT -5<sup>TH</sup> AMENDMENT

- Booking questions addressing biographical information are also not subject to *Miranda*.
- *State v. Jeny*, 163 Ariz. 293, 787 P.2d 1089
- *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990)

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5<sup>TH</sup> AMENDMENT -REACTION TO QUESTIONING

- It is not error to comment on the defendants reaction to questions asked by the officer when the suspect was not in custody and had not been *Mirandized*. (*State v. Salinas-Texas*)



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MOTIONS ARGUMENT -RIGHT TO COUNSEL

- 6th Amendment practice

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6<sup>TH</sup> AMENDMENT

“Sixth Amendment remedies should be ‘tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.’ Thus, a remedy must neutralize the taint of a constitutional violation while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution”

*Laffler v. Cooper*, 566 U.S. 156, (2012)

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MOTIONS ARGUMENT - RIGHT TO COUNSEL

- IS THERE ANY RIGHT TO A PARTICULAR LAWYER? – No
  - Only the right to a “competent” lawyer.
  - *State v. Schaaf*, 169 Ariz. 323, 819 P.2d 909 (1991)
  - *State v. Thorne*, 104 Ariz. 392, 453 P.2d 963 (1969)
- Compare- *State v. Rosengren*, 199 Ariz. 112, 14 P.3d 303 (App.2000).

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RIGHT TO COUNSEL

- Is there a right to consult with counsel both before and during trial proceedings?
  - Generally, Yes - *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018); *Michigan v. Harvey* 494 U.S. 344 (1990)

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RIGHT TO COUNSEL

- The Sixth Amendment does not guarantee a criminal defendant a 'meaningful relationship' with his attorney. Indeed, 'no Supreme Court case has held that the Sixth Amendment is violated when a defendant is represented by a lawyer free from actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust.' "

*Smith v. Adams*, 506 Fed. Appx. 561, 563-4 (9<sup>th</sup> Cir. 2013)

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DUI RIGHT TO COUNSEL - OVERALL REVIEW

DUI's

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RIGHT TO COUNSEL FOR DUI'S

- Remember your suspect's have to 1) clearly invoke
- 2) You or your office needs to determine for what purpose they invoked.

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### RIGHT TO COUNSEL-BLOOD/BREATH TESTS

- 3) A defendant is entitled to the assistance of an attorney in deciding whether to take a breath , blood or urine test if requested.
- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)

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### RIGHT TO COUNSEL FOR DUI'S

- 4) The State may not, without justification, prevent access between a defendant and attorney, when such access would not unduly delay the DUI investigation. (statutory two hour window is important)
- *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982)
- *State v. Sanders*, 194 Ariz. 156, 978 P.2d 133 (App. 1998)

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### RIGHT TO COUNSEL - BREATH TEST

- 5) Vice-versa - Defendant may not use the right to unreasonably interfere with an officer's investigation.
- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)
- Note-The burden is on the State to prove an unreasonable interference. *State v. Juarez, Id. !!*

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### DELAY OF THE DUI INVESTIGATION

- Held- Officer does not interfere with the defendants right to counsel by limiting the time for a phone call!
  - Stop at 5:15 a.m.
  - Invoked at 6:31 a.m.
  - Officer gave phone and phonebook. First test at 6:52, Second test 7:01 a.m.
  - Officer testified he was concerned about the two hour window .
  - *State v. Peraza*, 239 Ariz. 140, 366 P.3d 1030 (2016)

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### RIGHT TO COUNSEL FOR DUI'S

- 6) Police failure to provide call back number may constitute interference. Should provide some type of means to communicate with the defendant if defendants called them.
  - *State v. Sanders*, 194 Ariz. 156, 978 P.2d 133 (App. 1999)
  - But compare with *Martinez v. Superior Court (Garnett, RPI)*, 181 Ariz. 467, 891 P.2d 934 (App. 1994) (communication through an answering service for 45 minutes adequate.)

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### RIGHT TO COUNSEL FOR DUI'S

- If they call Defendants have a right to a private consultation.
  - 7) Consultation with counsel must be meaningful and, if requested, must be private.
  - *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985).
  - Memorandum warning - *State v. Clary*, 2016 WL 4524041 (2016)

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## DUI RIGHT TO COUNSEL

- RIGHT TO PRIVATE CONSULTATION
- Remember -The defendant must request privacy.
- *Municipal Court v. Waldron*, 157 Ariz. 90, 754 P.2d 1365 (App. 1988)

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**MIRANDA**

**RUDOLPHO AND HIS TALKING DOG- "OK THEN. YOU HAVE THE RIGHT TO AN ATTORNEY. ANYTHING YOU SAY CAN BE USED AGAINST YOU IN A COURT OF LAW..."**



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## DUI RIGHT TO COUNSEL

- 8) Do not confuse right to counsel issues with an interference with an independent chemical test. (Cada/Ganske cases)  
Separate the issues. Actual interference with an independent test may cause a case dismissal.

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## RIGHT TO COUNSEL - REMEDIES

### • WHAT IF THERE WAS A RIGHT TO COUNSEL VIOLATION?

- 1) Was it cured?
- 2) If not, what is the remedy?

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## REMEDIES- A VIOLATION MAY BE CURED

- A telephone call, consultation, opportunity, etc. may cure the violation.

- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)

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## DUI'S- DISMISSAL VS. SUPPRESSION

- DISMISSAL
- If there is interference with ability to obtain exculpatory evidence (not a right to counsel)
- *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982)
- But see *State v. Sanders*, 194 Ariz. 156 (App. 1999)
- SUPPRESSION
- If violation does not impinge on ability to collect exculpatory evidence
- *State v. Keyonne*, 181 Ariz. 485, 892 P.2d 205 (App. 1995);
- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)
- Memorandum Decision warning- *State v. Clary*, 2016 WL 4525041

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## REMEDIES – RIGHT TO COUNSEL

Right to private consultation (remember if requested)

- Remedy for this violation?
- Dismissal –*Holland*, supra. See *State v. Clary* discussion (warning-memorandum decision).
- *State v. Penney* 229 Ariz. 32 (App. 2012) –lack of access to a phone book with attorney listings resulted in denial of right to counsel.

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## REMEDY FOR MOST 5<sup>TH</sup> AMENDMENT VIOLATIONS

### • SUPPRESSION OF THE STATEMENTS

- *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

**Newer Case** - Suppression of the evidence is the proper sanction for violation of the right to counsel.

- *State v. Santillan*, 2016 WL3030120.-WARNING!!!-Memorandum decision. Good Motion in Limine argument!

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## MOTIONS IN LIMINE - SUPPRESSION IS NOT ALWAYS REQUIRED

- **Always** argue a 5<sup>th</sup> amendment violation does not require the suppression of any physical (non-testimonial) evidence. (For appeal if nothing else.)
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (App. 1995)
- A refusal to take a breath test is physical evidence. *Id*
- *U.S. v. Edmo*, 140 F.3d 1289, 1292 (9th Cir. 1998) –Blood alcohol test is not testimonial

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### MOTIONS IN LIMINE - 5<sup>TH</sup> AMENDMENT

- Field Sobriety tests and DRE exams are physical, not testimonial, evidence.
- *State v. Theriault*, 144 Ariz. 166, 696 P.2d 718 (App. 1984)
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (App. 1995)

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### MOTIONS IN LIMINE - SUPPRESSED EVIDENCE

- The defendant cannot use the constitution as both a shield and a sword.
- *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971)
- *U.S. v. Havens*, 446 U.S. 620, 100 S. Ct. 1912 (1980)
- *State v. Menard*, 135 Ariz. 385, 661 P.2d 649 (App. 1983)
- *State v. Fortier*, 149 Vt. 599, 547 A.2d 1327 (1988)
- *Suppressed evidence can still be used to impeach.*

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### RIGHT TO COUNSEL

- QUESTIONS?

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•THANK YOU!

• Materials provided by Beth Barnes, AZ GOHS Traffic Safety Resource Prosecutor

• Presented By: Tobin Sidles, Oro Valley Legal Services Director  
tsidles@orovalleyaz.gov

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